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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 666

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The comments made in the brief for the Government concerning the applicability of the Tucker Act to the plaintiff's cause of action for fire suppression costs requires a brief reply.

STATUTES INVOLVED

Section 1346, Title 28, U.S.C., provides in part:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

"(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

* * * * *

Section 13009 of the California Health and Safety Code provides:

"The expenses of fighting any fires mentioned in Sections 13007 and 13008 are a charge against any person made liable by those sections for damages caused by such fires. Such charge shall constitute a debt of such person, and is collectible by the person, or by the federal, state, county, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, expressed or implied."

ARGUMENT

I. If the Dismissal of Plaintiff's Claim for Fire Suppression Expenses Is Grounded on the Applicability of the Tucker Act, Then a New and Important Conflict and Federal Question Is Presented

In its brief in opposition to petition for writ of certiorari, the government argued that, in any event, the plaintiff's claim for fire suppression costs under Health and Safety Code Section 13009 could not be cognizable under the Federal Tort Claims Act because such a claim is founded in contract rather than in tort. Hence, argues the government, since the amount of the claim exceeds $10,000, it is also beyond the Tucker Act jurisdiction of the district court (Br. in Opp., p. 7).

The court below ruled in the alternative in affirming the dismissal of the plaintiff's claim for fire suppression costs. It stated (Pet., Appendix A, p. 17):

> "* * * But whether the action is founded in tort or in contract the district court had no jurisdiction in either case, for if in tort the complaint does not claim an 'injury or loss of property;' and if on contract the action is beyond the jurisidictional limit of the court."

Of course, if the claim is governed by the aforementioned provisions of the Tucker Act, there is no question but that it is not within the jurisdiction of the district court since the amount of the claim ex-

ceeds the jurisdictional limit of $10,000 of the district court under that Act (28 U.S.C. 1346(a)(2)). However, in holding that the plaintiff's claim was not within the jurisdiction of the district court under the Tort Claims Act, the court found it unnecessary to decide whether the claim was governed by the Tucker Act since under the latter act the claim could not be maintained in the district court in any event because it exceeds $10,000.

If, as the government suggests, the judgment of the Court of Appeals for the Ninth Circuit is based on a holding that the plaintiff's claim is governed by the Tucker Act limiting jurisdiction of district courts to claims, not exceeding $10,000, "upon any express or implied contract" (28 U.S.C. 1346(a)(2)), then a new and possibly more important conflict is presented. This conflict exists with the Court of Appeals for the Second Circuit which has held[1] that the "implied" contracts referred to in 28 U.S.C. 1346(a)(2) are implied in fact contracts as opposed to implied in law contracts. The complaint herein alleges no contract, either express or implied in fact (R. 3-6). It alleges simply and directly the negligence of employees of the United States and the existence of an uncontrolled fire and incurring of expenses to extinguish such fire as a proximate result of this negligence (R. 4-6). The only grounds for holding that the jurisdictional limitations of the Tucker Act apply in this

[1] *Alliance Assurance Company v. United States* (C.A.2) 252 F.2d 529, 532.

case is that the claim is founded on an implied in law contract. Such a holding constitutes a substantial departure from the established construction of the Tucker Act and presents an important federal question which should be settled by this court.

II. The Zegras Case Does Not Hold That the Statutory Obligation for Fire Suppression Costs Is Founded in Contract

In its effort to bring the plaintiff's claim within the aforementioned provisions of the Tucker Act the government cites *People* v. *Zegras*, 165 P.2d 541 (Dist. Ct. App.) and quotes language therefrom to the effect that the statutory obligation for fire costs under California law is a claim founded on a contract. The case cited by the government is not authority for any such proposition.

The language and decision in the *Zegras* case to which the government refers and from which it quotes was the opinion rendered by the Third District Court of Appeal which was *vacated* by the decision and opinion of the California Supreme Court in the same case in *People* v. *Zegras*, 29 Cal.2d 67, 172 P.2d 883. In that case an action was brought by the State of California to recover fire suppression costs under the statutory predecessor of Section 13009, Health and Safety Code. That action was brought in the county where the fire occurred. The appeal was taken by defendant from an order denying defendant's motion for a change of place of trial to his county of

residence. After the court of appeal affirmed the order of the trial court, defendant appealed to the California Supreme Court. That appeal was granted and the case was transferred to the Supreme Court. On this transfer the opinion and decision of the district court of appeal from which the Government quotes ceased to be authority in the case and in any respect precedent under California law (*Ponce* v. *Marr*, 47 Cal.2d 159, 161, 301 P.2d 837). As the California Supreme Court said in *Ponce* v. *Marr*, *supra*, at 47 Cal.2d 161:

> "The emphasized language in the foregoing quotation is not a correct statement of the law and, if allowed to stand, would result in confusion with reference to the subject. It therefore seems necessary to reiterate that the effect of an order of transfer to this court is to remove the cause in its entirety from the District Court of Appeal. Thereafter it is pending in this court the same as if originally lodged here. . . . Again it was stated in *Knowse* v. *City Council*, 8 Cal.2d 482, at page 483 [66 P.2d 438]: 'The opinion and decision of the District Court of Appeal, by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. . . . [W]ithout some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise than if they had not been written.' . . . ."

Hence, any statements of law in the district court of appeal's opinion in the *Zegras* case should not be given effect of precedent in construing Section 13009 of the Health and Safety Code.

Morever, the California Supreme Court in the *Zegras* case rejected the quoted language of the district court of appeal decision in unequivocal terms (29 Cal.2d pp. 68-69):

> " . . . . In enacting the statute upon which the present action is based, it directed that the expenses incurred in fighting fire ' . . . shall be collectible . . . in the same manner as in the case of an obligation under a contract, expressed or implied.' By this language, the enactment makes applicable to such an action the procedure governing a suit upon a contract, express or implied. It is immaterial, therefore, whether the statutory obligation for the expense of extinguishing a fire is classified as one sounding in tort, or a quasi contract, or a liability in the nature of a penalty; the Legislature has fixed the amount that may be recovered under specified conditions and made applicable the procedure for suit upon a contract."

The court could scarcely have more clearly disaffirmed the language of the district court of appeal holding that the statutory claim for fire suppression costs is founded on a contract.

CONCLUSION

For the foregoing reasons, this petition for a writ of mandate should be granted.

Respectfully submitted,

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